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No. 01-

IN THE

Supreme Court of the United States

ROBERT A. ERKINS & BERNADINE ERKINS,

Petitioners,

v.

ALFRED J. BIANCO, As Plan Administrator to the Estate of Gaston & Snow,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action involving state law claims brought in federal court based on federal subject matter jurisdiction – in this case, a breach of contract claim asserted by a debtor's plan administrator in a bankruptcy proceeding – what law governs choice of law: the federal common law or the law of the forum state? The decision below applying the forum state's law is in conflict with the decisions of several circuits.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 243 F.3d 599 and is reproduced in Appendix A ("App.") at 1a-22a. A transcript of the decision of the United States District Court for the Southern District of New York is reproduced in Appendix B ("App. B") at 23a-29a. The Order of the District Court, dated April 5, 2000, is reproduced in Appendix C at 30a-31a. The Judgment of the District Court, dated April 6, 2000, is reproduced in Appendix D ("App. D") at 32a-33a. The decision of the Court of Appeals denying the petition for rehearing is reproduced in Appendix E at 34a-35a.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 157 and 1334. The court of appeals asserted jurisdiction under 28 U.S.C. § 1291 and entered its judgment on March 19, 2001. A timely petition for rehearing was denied by that court on June 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Article IV, Section 2, of the United States Constitution states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

B. The Due Process Clause of the Fifth Amendment of the United States Constitution guarantees that no person shall

"be deprived of life, liberty, or property, without due process of law. . . ."

C. The Fourteenth Amendment of the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. The Rules of Decision Act, 28 U.S.C. § 1652, states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

E. New York's "Borrowing Statute," McKinney's Civil Practice Law and Rules § 202, states:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, *except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.*

(Emphasis added).[1]

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1. By operation of the italicized language, this statute favors New York-resident plaintiffs over non-resident plaintiffs whenever

(Cont'd)

STATEMENT OF THE CASE

In this action, the parties found themselves in federal bankruptcy court in the Southern District of New York disputing the existence and the terms of a contract that everyone agreed is governed by Idaho law.

Respondent, the plaintiff in the proceedings below, is the Plan Administrator of the bankruptcy estate of Gaston & Snow, a Massachusetts partnership. Petitioners, the defendants below, are Robert and Bernardine Erkins, residents of Idaho who contracted with Gaston & Snow for legal representation in a litigation conducted in the state courts of Idaho. The Plan Administrator sued the Erkinses for alleged unpaid legal fees owing under a written contract. Both sides agreed that the alleged contract was performed in Idaho and subject to Idaho law. This claim was adjudicated in a Manhattan courtroom only because an involuntary bankruptcy petition was filed by certain creditors against Gaston & Snow in the Southern District of New York.[2] Indeed, the Erkinses moved for a change of venue to the district court of Idaho, as New York had absolutely no contact with the parties or the underlying claim. That motion was denied in the discretion of the bankruptcy court.

(Cont'd)

the New York limitations period is longer than the limitations period of the jurisdiction in which the claim arose. In that circumstance, a New York plaintiff receives the benefit of the longer New York limitations period, whereas the non-resident plaintiff does not.

2. Gaston & Snow had maintained a satellite office in New York City and had creditors located in New York City.

After motions for summary judgment were denied, the case was transferred from the bankruptcy court to the United States District Court for purposes of trial. On March 6, 2000, trial commenced before the Honorable Jed S. Rakoff and a jury.

Although the pleadings sought to enforce the terms of a written contract for legal services, at the close of trial the district judge dismissed as insufficient the written contract claim. The court, however, allowed the plaintiff to argue to the jury that the Erkinses had breached an oral contract to pay hourly fees. This unexpected change in the theory of the case proved pivotal: under Idaho law, the statute of limitations for breach of an oral contract (four years) had run;[3] whereas the Idaho statute of limitations for breach of a written contract is five years,[4] so that the original claim, when filed, was timely.

The Erkinses moved to dismiss the breach of oral contract claim as time-barred under Idaho law. The district court sided with the Plan Administrator, who urged application of New York's borrowing statute,[5] which gave the Plan Administrator, a New York resident, the benefit of New York's longer six-year statute of limitations.[6] The district court held that the application of New York law in this case was "not constitutionally infirm." (App. B, 28a). The district court emphasized, however, that

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3. Idaho Revised Code § 5-217. There is no dispute that the claim against the Erkinses for unpaid legal fees accrued more than four years before this action was commenced.

4. Idaho Revised Code § 5-216.

5. McKinney's Civil Practice Law and Rules § 202.

6. McKinney's Civil Practice Law and Rules § 213(2).

should the Idaho four-year limitation period be found controlling on appeal, plaintiff's oral contract claim "would fall." (App. B, 29a).

The application of New York's longer statute of limitations enabled the case to go to the jury. The jury returned a verdict in favor of the plaintiff and awarded $1,800,841.41. In addition, the district court awarded pre-judgment interest under Idaho law in the amount of $2,114,364.94. (App. D, 32a).

An appeal was filed in the Court of Appeals for the Second Circuit. The court affirmed, relying heavily on the *Erie*[7] doctrine and the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*[8] The court prefaced its opinion with the observation that "federal courts are divided concerning whether federal choice of law rules or the choice of law rules of the forum state apply." (App. 11a). It then held that the *Erie* doctrine dictates that, absent compelling federal interests, the choice of law of the forum state – New York – must be applied, even though the panel noted that "there could not have been a diversity action brought against the Erkins in New York because they are not subject to personal jurisdiction in New York." (App. 15a). The court found "no . . . federal policy or interest that would be violated, in this case, if the choice of law rules of the forum state were utilized." (App. 13a).

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7. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (to avoid forum shopping and promote uniformity of outcome between federal and state courts in diversity cases, federal district courts must apply forum state's decisional law).

8. 313 U.S. 487 (1941) (*Erie* doctrine requires a federal diversity court to apply the choice of law rule of the forum state).

The Second Circuit recognized that under the federal choice of law rule, "the borrowing statute would not be considered and there is little doubt that New York's statute of limitations would not apply." (App. 10a). This is true, it wrote, because "federal choice of law rules apply the law of the jurisdiction with the most significant relationship with the action and New York's relationship to the action is insignificant compared to Idaho's." (App. 10a-11a) (citations omitted).

REASONS FOR GRANTING THE WRIT

For several reasons, this case is the perfect vehicle for this Court to promulgate a rule that answers the question presented: whether a district court should apply the federal common law choice of law rule or the choice of law rule of the forum state in a non-diversity case.

First, the question presented is an important and recurring question of basic federal civil procedure left open by *Erie* and *Klaxon*. The question has perplexed the Circuit Courts of Appeal, producing sharp conflicts among the circuits.

Second, the choice of law question is the only question raised on petition here and no dispute exists as to any facts that may be material to answering the question. Indeed, the district court specifically held that if the New York borrowing statute did not apply, plaintiff's contract claim would be dismissed as time-barred. Thus, the Court's consideration of this single issue will be free of factual or other legal complications.

Third, the choice of law question unexpectedly became the linchpin of this case and was thus squarely addressed by both the district court and the Court of Appeals, albeit erroneously. The district court applied *Klaxon* as if it were a diversity court

and not a bankruptcy court; the Court of Appeals affirmed, failing to recognize the substantial federal interests at stake: violations of the Due Process and the Privileges and Immunities Clauses.

I. A Recurring Question Is Left Open by *Erie* and *Klaxon*

In *Erie R.R. Co. v. Tompkins*, this Court overruled *Swift v. Tyson*[9] and the long-held view that a body of decisional law on general matters, known as "federal common law," could co-exist with state law. In *Erie*, this Court held that federalism demands that there not be judicially-created federal law on substantive rights arising out of state law. The twin aims of *Erie* were clear: (1) to discourage forum shopping as between federal and state courts, and (2) to promote vertical uniformity in diversity cases (as between the results obtained in federal and state courts sitting within the same state). *See Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

Building on *Erie*, this Court in *Klaxon* held that federal courts in diversity cases must also apply the forum state's "conflict of laws" principles, because uniformity of outcome requires application not only of the forum state's substantive law but also its choice of law rule, thus equating choice of law with substantive decisional law.[10]

In *Guaranty Trust Co. v. York*,[11] this Court held that statutes of limitations are substantive for *Erie* purposes if they affect the outcome of the litigation. The Court looked to whether the law

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9. 41 U.S. 1 (1842).

10. 313 U.S. at 496.

11. 326 U.S. 99 (1945).

in question would be "outcome determinative." The rationale was, again, to adhere to the *Erie* principle that different results should not obtain by being in federal court as opposed to state court. Like *Klaxon*, *Guaranty Trust* was decided in the context of a diversity action and explicitly sidestepped the question of whether the same holding would be reached in cases premised upon federal subject matter jurisdiction.[12]

However, more recently, outside the diversity context, this Court has explained that statutes of limitations have historically been considered part of the "general law," that is, dealing with the court's "procedure" and not the parties' "substantive" rights. As Justice Scalia explained in *Sun Oil Co. v. Wortman*, "the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts."[13] Thus, Justice Scalia, joined by four other members of the Court, concluded that "statutes of limitations [are] procedural for purposes of choice of law."[14]

The continuing disagreement over whether the holdings of *Klaxon* and *Guaranty Trust* extend beyond diversity cases, compounded by the confusion over whether the choice of a statute of limitations is substantive or procedural, leads to the present conflict among the circuits.

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12. *Id.* at 101-02.

13. 486 U.S. 717, 726 (1988).

14. *Id.*

II. Conflict Among the Circuits

The Second Circuit decision below acknowledged the conflict that exists among the circuits: "federal courts are divided concerning whether federal choice of law rules or the choice of law rules of the forum state apply." (App. 11a). In fact, circuit courts have developed three distinct approaches to this issue.

Appellate panels in the First, Fifth, Sixth and Ninth Circuits have held that the rule of *Erie* does not apply in federal subject matter jurisdiction cases. *See Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) ("When jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law"); *In re Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980) ("When disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy"); *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130-31 (6th Cir. 1996) (applying federal common law choice of law rules to claims arising under the Foreign Sovereign Immunities Act ("FSIA")); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987) (holding *Klaxon* not applicable to FSIA case as federal jurisdiction not based on diversity of citizenship).

Implicit in the holdings of these circuit courts is the rationale articulated by the Ninth Circuit panel in *In re Lindsay*: "the risk of forum shopping which is avoided by applying state law has no application, because the case can only be litigated in federal court."[15]

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15. 59 F.3d 942, 948 (9th Cir. 1995).

In contrast, the District of Columbia Circuit has resolved this issue by rigidly applying the *Erie* rule in non-diversity cases. *See A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("The *Erie* doctrine is not simply a rule of convenience for diversity cases but an acknowledgment of the powers of the several states and of the limited nature of the federal government.")

The Fourth Circuit and the Second Circuit decision below have adopted a third approach: applying *Erie* in non-diversity cases, but with the caveat that state law will not be used if its application would abridge an important federal interest. *See In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988) ("in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest").[16]

The balancing test adopted by the Second and Fourth Circuits was first enunciated by this Court in *Vanston Bondholders Protective Comm. v. Green*,[17] also a suit arising in bankruptcy. In *Vanston*, this Court came closest to stating that *Erie*

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16. In extending *Klaxon* with the federal interest caveat, these courts of appeal necessarily recognize that the *Erie* doctrine has not eliminated "federal common law," even in areas where it might supplant state law. This Court has steadfastly held that federal common law is appropriate, indeed necessary, where application of state law would result in "a significant conflict between some federal policy or interest and the use of state law." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997). Such a conflict, this Court has held, would justify "creation of a special federal rule." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994).

17. 329 U.S. 156 (1946).

considerations do not apply outside of diversity cases: "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. Co. v. Tompkins* . . . has no such implication."[18] Nonetheless, the Second Circuit panel in this case relied upon *Vanston* as support for its refusal to "create" federal common law.[19]

III. The Decisions Below Undermined the Twin Aims of the *Erie* Doctrine

Although purporting to follow the *Erie* rule, the decisions below turned *Erie* on its head. Neither of the dual purposes of *Erie* was achieved by the application of the New York borrowing statute in this case. Indeed, the objectives of *Erie* are undermined by the application of the forum state's choice of law rule in the circumstances presented here.

Applying the forum state's law in an adversary proceeding in bankruptcy court does not discourage forum shopping by debtors. Rather, it offers debtors an inducement to "shop" for a more favorable outcome to intended litigation by filing for bankruptcy in a district in which the state law favors them.

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18. 329 U.S. at 162.

19. The panel needlessly fretted over the "creation" of federal common law in this case (App. 14a), as if a federal choice of law rule did not already exist. Yet the panel also acknowledged that "federal choice of law rules apply the law of the jurisdiction with the most significant relationship with the action." (App. 11a). In fact, this case poses the question not whether the federal courts should "create" a rule of federal common law, but rather whether a federal rule that already exists should be applied in non-diversity cases.

This is so because bankruptcy courts are invested with original jurisdiction to hear any matters relating to a bankruptcy case.[20] A debtor is empowered to commence any claim in the district where its bankruptcy case is pending[21] and jurisdiction is nationwide.[22] The bankruptcy venue statute permits debtors and creditors to file a bankruptcy case in any district where the debtor is incorporated, or headquartered or has its principal assets.[23]

While there is no suggestion that forum shopping occurred in this case, as the choice of law question arose unexpectedly and at the late stages of trial, the prospective effect of the decisions below will be to encourage a debtor or creditor to file the petition for bankruptcy in the state where the local law is most hospitable to its claims. Given the national character of many businesses, whose places of incorporation, headquarters and assets are in different states, a debtor or creditor can survey the various jurisdictions in which a bankruptcy filing may be appropriate to find the venue most hospitable to its potential claims, expecting the state law of the selected bankruptcy jurisdiction to apply without regard to whether that state has any connection to the claims to be adjudicated. That is the perverse result of the decisions below.

Thus, in the bankruptcy context, where the state in which the bankruptcy court sits may have little or no connection to the controversy, only a federal choice of law analysis can guarantee

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20. 28 U.S.C. §§ 157 and 1334.

21. 28 U.S.C. §§ 1408 and 1409.

22. Bankruptcy Rule 7004.

23. 28 U.S.C. § 1408.

the selection of that state's law with which the federal court ought to be striving to achieve consistency. This proposition was cogently stated in *In re SMEC, Inc.*, 160 B.R. 86, 90 (M.D. Tenn. 1993):

> In a diversity case, it is presumed that the forum state has the greatest interest in seeing its laws applied. In a federal bankruptcy case incorporating state law, this presumption is untenable. There is no necessary reason to believe that the forum state is the state with the greatest interest in a bankruptcy proceeding. In fact, in today's business world, the location of a debtor may bear little relation to the location of his or her property interests or to the corpus of his or her business dealings. A choice of law rule that looks to the state with the greatest interests in the proceeding acknowledges the complex nature of property and transactions and thereby protects state interests. Often times the forum state will be the state with the greatest interests, but there is no need for such a presumption.

Nor did the application of the forum state's choice of law rule in this case further *Erie*'s objective of achieving "uniformity of outcome." Lacking minimum contacts with the defendants and the underlying claims,[24] the state courts of New York could not have taken jurisdiction over this case. Thus, one might well ask, why was the district court striving to achieve consistency with a state court that was powerless to entertain the suit? To achieve the type of uniform outcome desired by *Erie*, the district court should have determined what result would obtain had this simple breach of contract claim been brought in a jurisdiction that has sufficient contacts both to these defendants and to the underlying claim.

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24. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

That is to say, in this case the uniformity *Erie* seeks to promote would require that the district court apply the same law that a state court *in Idaho* would have applied. The decisions below requiring the application of the New York borrowing statute actually undermined the achievement of this objective.

IV. The Decisions Below Were Erroneous and Resulted in the Violation of Substantial Federal Interests

The district court's perception that it must act in the same manner as a New York state court would have acted was clearly an erroneous one. Insofar as the district court felt constrained to follow the *Klaxon* rule, it need not have. The court was not sitting in diversity jurisdiction, but rather was adjudicating a related claim pursuant to its original jurisdiction to hear cases in bankruptcy.[25] New York could not have entertained the suit, lacking personal jurisdiction over the defendants and minimum contacts with the underlying claims. There was no need for the district court to strive for consistency of outcome with the state courts of New York.[26]

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25. 28 U.S.C. §§ 157 and 1334.

26. To the extent the district court was motivated to apply *Klaxon* so as to achieve the same salutory benefits as are achieved under diversity jurisdiction, it failed. Diversity jurisdiction was intended to provide an impartial forum for the administration of justice between citizens of different states, not a forum that favors the home team. Far from achieving impartiality, the district court chose to select a discriminatory choice of law rule, thereby *defeating* the fundamental objective of diversity jurisdiction. The federal interest underlying diversity jurisdiction, embedded in Article III of the Constitution itself, is best served through the application of a neutral (*i.e.*, federal) choice of law rule, and not through the selection of a parochial state rule that discriminates in favor of local residents.

The rote application of *Klaxon* in this non-diversity case was not, as the district court believed, commanded by any decisions of this Court. Indeed, this Court in *Vanston* has previously suggested that *Erie* principles do not apply in bankruptcy cases.[27] This Court has also analyzed the nature of statutes of limitations so as to suggest that *Erie* principles need not be extended beyond diversity cases in the selection of a limitations period. In *Sun Oil Co. v. Wortman*, a majority of this Court held that *Guaranty Trust* "rejects the notion that there is an equivalence between what is substantive under the Erie doctrine and what is substantive for purposes of conflict of laws."[28] That majority concluded that statutes of limitations are "procedural for purposes of choice of law"[29] and, accordingly, a forum court may "apply its own statute of limitations to a claim governed in its substance by another State's law."[30] Thus, *Vanston* and *Sun Oil* read together lead logically to the conclusion that when a district court serves as the forum court in a non-diversity case, it ought to employ its own choice of law rule to determine which jurisdiction's ultimate rules of decision apply.

The decision of the Second Circuit was internally inconsistent and illogical. The appellate panel recognized that the Plan Administrator could not have brought this action in the New York courts, but nonetheless went on to hold that "the district court was correct in sitting as if it were a New York state court for purposes of determining the applicable statute of limitations."

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27. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. at 162-63.

28. 486 U.S. at 726.

29. *Id.* at 725.

30. *Id.* at 727.

(App. 10a). The Second Circuit's affirmance was based on an analysis of "whether a New York state court, relying on the borrowing statute, would have applied New York's statute of limitations" (App. 10a), when no New York state court ever could have entertained this suit.

Moreover, the Second Circuit panel laid down a rule requiring that it perform a "federal interest" analysis, yet never really conducted such an analysis. Thus, the panel failed to perceive or adequately address the significant federal interests that are offended by the application of the New York borrowing statute: namely, the interests embodied in the Due Process and the Privileges and Immunities Clauses.[31]

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31. The *Erie* doctrine, of course, does not override the bedrock constitutional protections of the Due Process and Privileges and Immunities Clauses. The limitations the Due Process Clause places upon the application of state law, as first recognized in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), have been invoked by this Court post-*Erie*. For example, in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981), the Court held that the selection of a state's choice of law rule must be measured against the parties' expectations, and that the uniqueness of the state law being applied must not result in fundamental unfairness. Four years later, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), the Court reaffirmed the plurality's opinion in *Allstate* that the Due Process Clause places restrictions upon the application of forum law, holding that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." So too, in *Angel v. Bullington*, 330 U.S. 183, 188 (1947), a case decided after *Erie*, *Klaxon* and *Guaranty Trust*, the Court recognized that "the Privileges or Immunities Clause . . . fetter[s] the freedom of a State . . . to regulate 'the practice and procedure' of its courts." Thus, it is clear that the rights guaranteed by the Due Process and Privileges and Immunities Clauses have survived the promulgation of the *Erie* rule.

Here petitioners were denied due process because the district court applied the law of New York, a state which lacked both minimal contacts with the controversy and personal jurisdiction over the defendants. The due process issue was squarely presented to the Second Circuit panel, which acknowledged that "there could not have been a diversity action brought against the Erkins in New York because they are not subject to personal jurisdiction in New York." (App. 15a). Nevertheless, the panel failed to attach the proper significance to its own observation, dispatching this thorny problem with the cryptic comment that it:

> would be more persuasive if a New York state court were applying New York's statute of limitations. Indeed, in that situation, defendants' constitutional argument would be that New York state courts lack personal jurisdiction over them. Here, by contrast, defendants concede that the bankruptcy court had personal jurisdiction over them. Given this concession, there is no constitutional barrier to utilizing New York's statute of limitations.

(App. 19a).

The panel's reasoning is flawed in that it confuses judicial jurisdiction – the power of a court to hear a case – with legislative jurisdiction – the power of a state to apply its law to affect the legal rights of parties.[32] While a bankruptcy or district court sitting in New York may have had jurisdiction to try a case in its court, it was without power to apply New York law to affect the legal rights of non-resident parties transacting their affairs entirely outside of New York's borders.

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32. *See* Reese, Legislative Jurisdiction, 78 Colum. L. Rev. 1587 (1978), discussing territorial limits of legislative jurisdiction.

The Second Circuit failed also to recognize that its decision offended the substantial federal interest embodied in the Privileges and Immunities Clause. The Privileges and Immunities Clause was violated by the district court's decision to apply a rule that secured a favorable outcome to a citizen of the forum state, while denying that same favorable result to any non-resident. This federal interest was identified by Justice Stevens in his concurring opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981), as follows:

> Concern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied. The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law.

Here, precisely the type of "unfairness" described by Justice Stevens was visited upon the petitioners. Without question, the borrowing statute "favored residents over nonresidents." *Id.* at 327. Moreover, by any reckoning, it is safe to conclude that the Erkinses and Gaston & Snow "could not reasonably have anticipated that their actions would later be judged" by the law of New York. *Id.*

The protections of the Due Process and Privileges and Immunities Clauses are compelling federal interests that override any weak interest New York may have had in seeing its borrowing statute applied in this case. Accordingly, the circumstances

presented here more than meet this Court's test for applying a federal common law choice of law rule: "namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest." *Atherton v. FDIC*, 519 U.S. 213, 224 (1997), *quoting O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve this recurring and fundamental question of federal civil procedure.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MARCH 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 11, 2001 Decided: MAR 19 2001)

Docket No. 00-5039

In Re: GASTON & SNOW,

Debtor,

ALFRED J. BIANCO, As Plan Administrator
to the Estate of Gaston & Snow,

Plaintiff-Appellee,

against

ROBERT A. ERKINS & BERNADINE ERKINS,

Defendants-Appellants.

Before: VAN GRAAFEILAND, WINTER & CALABRESI,
Circuit Judges

* * *

Appendix A

VAN GRAAFEILAND, *Senior Circuit Judge*:

Robert and Bernadine Erkins, an Idaho couple, appeal from a final judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) The judgment entered following a jury trial. The jury found that the Erkins[1] breached an oral contract to pay their attorneys, the now defunct and bankrupt law firm of Gaston & Snow ("G&S"), on an hourly basis. The jury awarded G&S's trustee in bankruptcy, plaintiff-appellee Alfred J. Bianco, $1,800,841.41 for breach of contract damages. Following the jury verdict, the district judge determined that, under the law of Idaho, an award of $2,114,364.94 in prejudgment interest was proper. For the reasons that follow, we affirm.

In deciding this appeal, we are required to resolve an issue that has divided the federal courts. The issue is whether a bankruptcy court hearing claims that are based upon state law and do not implicate federal policy should apply federal choice of law rules or whether the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), that federal courts exercising diversity jurisdiction must apply the choice of law rules of the forum state, should be extended. Because federal choice of law rules area type of

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1. The author is aware of the grammatical rule which dictates that to create the plural form of a proper name that ends in an "s" one must add an "es." *E.g.*, *The Chicago Manual of Style* § 6.5 (13th rev. ed. 1982). Thus, the plural of "Erkins" would be "Erkinses." However, the author finds the name "Erkinses" so distracting that he chooses to ignore the rule. No such willingness to ignore the rules of the English language should be imputed to Judges Winter or Calabresi.

federal common law, which federal courts have only a narrow power to create, we decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state.

BACKGROUND

Defendant-appellant Robert Erkins is a businessman who owned one of the largest trout farming companies in the world. He and his wife, Bernadine also ran an international seafood conference.

In 1984, the Erkins started a new venture raising and marketing oyster mushrooms. They incorporated in the name of Bliss Valley Foods, Inc. They solicited investors — mainly Idaho doctors — and secured a loan from Idaho First National Bank ("First National"). The loan amount was $3,150,000, which the Erkins personally guaranteed and pledged a $5.5 million ranch to secure.

The mushroom operation was unsuccessful; Bliss Valley filed for bankruptcy, and litigation ensued. The Erkins were sued by First National and the investors in Idaho state court. At first the Erkins were represented by an Idaho law firm. However, the Erkins soon came to believe they needed to bring in a firm with "hard hitting" litigators. They found such a firm in G&S. They knew of G&S, a Boston-based firm with a satellite office in New York City, because G&S bankruptcy partner Charles Vihon represented Bliss Valley.

The lead litigator for G&S in the Bliss Valley litigation was Edwin McCabe. McCabe convinced the Erkins that the

best defense was a good offense, and therefore that filing a lender liability counterclaim against First National was prudent. The counterclaim alleged First National deliberately sabotaged the mushroom operation and forced Bliss Valley into insolvency. McCabe managed to convince the investors to drop their suit against the Erkins and join in the counterclaim against First National.

The case went to trial and the jury found in favor of the Erkins and Bliss Valley on the lender liability counterclaim. The jury awarded the Erkins $2,001,000 and Bliss Valley $3,100,000. After the verdict was returned, the trial court determined that it should award attorney's fees to the Erkins and Bliss Valley. In doing so, it concluded that G&S had taken the case on an hourly fee basis.

First National appealed. By the time of the appeal, the relationship between the Erkins and G&S had become acrimonious due to disagreements over billing. Thus, the Erkins did not retain G&S to handle the appeal. First National won a reversal in the Idaho Supreme Court. *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841 (Idaho 1991) (issued on denial of rehearing). Upon remand, the Erkins settled with First National and agreed to pay the bank $400,000.

In 1991, an involuntary chapter 11 petition was filed against G&S in the United States Bankruptcy Court for the Southern District of New York. In 1993, plaintiff-appellee Alfred J. Bianco, Plan Administrator to the Estate of G&S, filed an adversary proceeding against the Erkins seeking to recover $1.7 million for legal services allegedly rendered by G&S to the Erkins.

Appendix A

The Erkins had little, if any, connection to New York. Although G&S had a satellite office in New York, the G&S attorneys who represented the Erkins were based in Boston. Nonetheless, the Erkins did not challenge the New York bankruptcy court's exercise of personal jurisdiction over them. On appeal, the Erkins explain that they did not attempt to dismiss the complaint on personal jurisdiction grounds because they interpreted Bankruptcy Rule 7004 to require minimum contacts with the United States as a whole rather than with the forum state. *C.f.*, *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981); *In re Outlet Dep't Stores, Inc.*, 82 B.R. 694, 699 (Bankr. S.D.N.Y. 1988).

The Erkins counterclaimed against G&S and moved to transfer the proceedings to the United States District Court for the District of Idaho. After a hearing, Bankruptcy Judge Cornelius Blackshear denied the transfer motion. Thereafter, the proceedings were transferred to the United States District Court for the Southern District of New York for a jury trial.

At trial, the parties presented sharply different versions of the fee arrangement between G&S and the Erkins. The trustee claimed that the Erkins orally agreed to pay G&S's customary hourly rate. Defendants claimed that G&S undertook the representation on a contingency basis. Given that the lawsuit against First National did not yield any recovery for the Erkins, they argued that they owed G&S nothing.

Vihon testified on behalf of defendants that G&S undertook the representation on a contingency fee basis.

However, Vihon also testified that G&S and the Erkins never discussed the terms of the contingency agreement. Specifically, Vihon testified that they never agreed upon a percentage of the recovery that would go to G&S. Although Vihon never drafted a written contingency agreement, some of G&S's internal documents indicate that G&S treated its representation of the Erkins as taken on a contingency basis.

Robert Erkins also testified that the case was taken on a contingency basis. However, he was unable to produce any documents demonstrating the terms of the alleged contingency arrangement. Mr. Erkins initially testified that he and Vihon agreed that the percentage was 33%, but later retracted his testimony. Mr. Erkins ultimately testified that he and Vihon never discussed a specific percentage term.

The district court found the lack of a percentage term fatal to defendants' theory that they were under no obligation to pay G&S because the case was taken on a contingency basis. Although courts sometimes may supply a percentage term according to custom, the district court ruled that custom cannot provide a missing term when the representation is far removed from the normal type of case in which contingency agreements are used. The district court ruled that G&S's representation of the Erkins was not a typical contingency fee situation because, as Robert Erkins recognized, a favorable result for the Erkins would not have required a monetary recovery against First National. Rather, if the Erkins merely escaped liability for their guarantee of the loan, that would have been an excellent result. The district judge therefore instructed the jury that the Erkins' defense of a contingency agreement should not be considered.

Appendix A

In support of the view that G&S billed defendants on an hourly basis, Bianco pointed to several documents which evidenced an oral agreement to pay hourly fees. First, Bianco introduced an agreement executed by the Erkins on the eve of the Idaho trial. In the document, the Erkins agreed to pay a premium — an amount above and beyond whatever was owed to G&S prior to the execution of the agreement — in the event the counterclaim against First National yielded a significant monetary recovery. The district court thought this agreement suffered from lack of consideration because McCabe presented the agreement to the Erkins as the price of G&S's continuing representation.[2] In response, Bianco decided not to seek to have the jury award damages based upon the premium agreement, but continued to rely on the premium agreement as evidence that an oral contract to pay hourly fees had existed prior to the agreement. Specifically, a sentence in the premium agreement noted that "[t]he existing fee arrangements provide G&S . . . shall render professional services to Erkins and shall be paid by the hour and shall be reimbursed for all expenses." Second, the fee application submitted to the Idaho trial court indicated that

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2. This was not the only occasion where a court chastised McCabe and G&S for questionable ethics. The Idaho trial court, after reviewing G&S's fee application, stated that "[t]he Court has been disturbed by Mr. McCabe's firm listing many personal expenses in the Memorandum of Costs and Disbursements. Had these matters not been called to the Court's attention, these items of expense may well have been included in the allowable costs [paid by the bank] and such payment would certainly have amounted to fraud upon the Court. . . . The Court also notes that [G&S] has used the most expensive means of transportation and the most expensive housing or lodging available. . . ."

the Erkins had been billed on an hourly basis. Third, the Idaho trial court found "that this was not a contingent fee case. It was taken on a specific hourly basis and payment of attorneys fees and costs was based upon a favorable outcome of the law suit so far as the counterclaimants were concerned."

Defendants argued that the oral contract claim should be dismissed as barred by the statute of limitations. In analyzing this argument, the district court had to decide which state's statute of limitations applied. Defendants argued that Idaho's four-year limitations period applied, under which, they argued, the oral contract claim was barred. The trustee argued that New York's six-year period applied, in which case the parties agreed the claim was validly pending.

The district judge ruled that New York's limitations period applied.[3] First, the district judge stated that he would sit as if he were a New York state court judge. The district judge did not analyze the main issue we address today — whether a bankruptcy court (or as here, a district court which

3. The district court concluded that if the Idaho statute applied, the jury would have been required to determine whether G&S and the Erkins had entered into a separate agreement whereby the Erkins were not required to pay G&S until the conclusion of the Idaho trial. This was true because the vast majority of G&S's legal work for the Erkins occurred more than four years before Bianco filed this action. Thus, for plaintiff's claims to be timely, the jury would have been required to find that the parties entered into a forbearance agreement. Since the jury did not confront this issue, were we to find the Idaho statute applicable, we might thus be required to remand the case for a new trial.

has been transferred a bankruptcy proceeding for trial) applies federal choice of law rules or the choice of law rules of the forum state. Second, the district judge thought that a New York state court would apply the longer New York limitations period. New York has a "borrowing statute," CPLR 202, which mandates the application of New York's statute of limitations when "the cause of action accrued in favor of a resident of the state." The district court did not identify who was the New York resident for purposes of 202 — Bianco or G&S. Defendants did not bring this problem to the district court's attention, but they raise it on appeal. Defendants did argue that it was unconstitutional to apply New York's statute of limitations to them because they had no connection to New York. The district court rejected this argument.

The jury found in favor of the trustee on the breach of oral contract claim, and also on defendants' counterclaim. The jury awarded the trustee $1,800,841.41.

The parties agreed that Idaho law governed the award of pre-judgment interest. The Idaho Code provides for the award of prejudgment interest on "[m]oney after the same becomes due." Idaho Code § 28-22-104(1)2. Idaho courts award prejudgment interest only if the damages are "liquidated or ascertainable by mere mathematical process." *Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc.*, 10 P.3d 734, 741 (Idaho 2000). The district court found the fees owed to G&S were in this category, and awarded plaintiff $2,114,364.94 in pre-judgment interest.

Appendix A

DISCUSSION

I. Choice of Law

In deciding this appeal, we resolve a question left open[4] in *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992). There, we suggested, in dicta, that bankruptcy courts[5] should apply the choice of law rules of the forum state unless the case implicates important federal bankruptcy policy.

Thus, if *Koreag* suggested the proper rule, the district court was correct in sitting as if it were a New York state court for purposes of determining the applicable statute of limitations. We analyze below whether a New York state court, relying on the borrowing statute, would have applied New York's statute of limitations. By contrast, if federal choice of law rules are to be utilized, the borrowing statute would not be considered and there is little doubt that New York's statute of limitations would not apply. This is

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4. We said in *Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993), that "[t]he state law to be applied is determined by the choice of law principles of the forum state." We do not view *Kalb's* statement as dispositive of the question before us because there is no indication that utilizing federal choice of law rules would have altered the result in *Kalb* or that the choice of law issue was contested by the parties.

5. Here, the bankruptcy court transferred the case to the district court for a jury trial. The parties have not suggested that this transfer has any effect on our resolution of the choice of law question, and we perceive no reason for concluding otherwise.

true because federal choice of law rules apply the law of the jurisdiction with the most significant relationship with the action, *e.g.*, *Advani Enterprises, Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 162 (2nd Cir. 1998); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 14 (2d Cir. 1996), and New York's relationship to the action is insignificant compared to Idaho's.

The federal courts are divided concerning whether federal choice of law rules or the choice of law rules of the forum state apply. *Compare, e.g., In re Merritt Dredging Co.*, 839 F.2d 203, 205-06 (4th Cir. 1988) (utilizing choice of law rules of forum state) *with In re Lindsay,* 59 F.3d 942, 948 (9th Cir. 1995) (utilizing federal choice of law rules) *and In re SMEC Inc.*, 160 B.R. 86, 89-91 (M.D. Tenn. 1993) (articulating policy reasons why federal choice of law rules should apply).[6] *See generally* James T. Markus & Don J. Quigley, *Conflict of Laws-Which State Rules Govern?*, 18-Nov. Am. Bankr. Inst. J. 18 (1999). Further, our prior cases dealing with other federal statutes that provide a federal forum for claims that hinge upon state law do not provide clear guidance. *Compare Corporacion Venezolana*

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6. Other circuits have declined to resolve the question of whether federal or forum choice of law rules apply. *See Matter of Morris*, 30 F.3d 1578, 1581-82 (7th Cir. 1994); *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 747-49 (5th Cir. 1981). *But see Matter of Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980) (stating, in a bankruptcy case, that "[w]hen disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy.").

de Fomento v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980) (applying federal choice of law rules in case arising under Edge Act) *with Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12-13 (2d Cir. 1996) (applying forum choice of law rules in case arising under Warsaw Convention) *and Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1029-30 (2d Cir. 1996) (same).

Our resolution of this question begins with the recognition that federal choice of law rules are a species of federal common law. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice of law rule is no less a rule of state law than any other. . . ."). The recognition that federal choice of law rules are no different from any other judicially created rule of decision is based upon *Klaxon*, which treated choice of law rules no differently from the arguably more "substantive" type of federal common law that was prohibited in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See Klaxon*, 313 U.S. at 496.

Once it is recognized that federal choice of law rules are a species of federal common law, the framework the Supreme Court has established for determining whether the creation of federal common law is appropriate must be utilized. The ability of the federal courts to create federal common law and displace state created rules is severely limited. The Supreme Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotation marks omitted). Before federal courts create federal common law,

"a significant conflict between some federal policy or interest and the use of state law must first be specifically shown." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (internal quotation marks & alteration omitted).

We find no such federal policy or interest that would be violated, in this case, if the choice of law rules of the forum state were utilized. The Ninth Circuit has suggested that there is a federal interest in national uniformity which should not be subordinated to the differences in state choice of law rules. *In re Lindsay*, 59 F.3d at 948; *see also Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, *J.*, concurring) (stating that interest in uniformity is in treating existing obligations of the debtor alike, "regardless of the State in which the bankruptcy court sits"). The Ninth Circuit's concern is arguably present here, for the Erkins, who have little connection to New York, find themselves subject to New York's statute of limitations due to the intricacies of New York's borrowing statute. Further, applying a federal rule of most significant contacts may prevent forum shopping by debtors. *In re SMEC*, 160 B.R. at 89-91 ("Rather than allow debtors in the shadow of bankruptcy to restructure or relocate their business dealings in such a way as to gain the benefit of a certain forum's laws, this rule imposes on debtors the laws under which they primarily acted. Likewise, creditors and other parties are not subjected to, or given the benefit of, an unjustified quirk of legal procedure that imposes on them laws under which they rarely or never transacted.").

We recognize the concerns expressed by these courts, but do not believe they implicate significant enough federal

interests to justify the creation of federal common law in this case. While an interest in uniformity can justify the creation of federal common law, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), *Klaxon* rejected the need for uniformity as a justification for displacing state conflicts rules. *Klaxon*, 313 U.S. at 496; *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 228-31 (1996). Regarding the federal interest in avoiding forum shopping, we believe there are only a limited number of cases in which this interest is implicated. Here, for example, where the debtor was brought into bankruptcy court through an involuntary petition, it is difficult to argue that any forum shopping occurred.

Counterbalancing the policy concerns expressed by those courts that have utilized federal choice of law rules are the policy goals recognized by the Fourth Circuit in *In re Merritt Dredging*, 839 F.2d at 205-06. The Fourth Circuit explained:

> We believe . . . that in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest. . . . A uniform rule under which federal bankruptcy courts apply their forum states' choice of law principles will enhance predictability in an area where predictability is critical. Most important, such a rule would accord with the model established by *Erie* and *Klaxon*. Both those cases make clear that federal law may not be applied to questions which arise in federal court but whose determination is

> not a matter of federal law. . . . Such is the case with questions regarding the extent of a bankruptcy debtor's property interests. . . . It would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy.

Id. at 206 (internal citations omitted). The situation presented in the instant case is slightly different from that facing the Fourth Circuit in *In re Merritt Dredging*. In the instant case there could not have been a diversity action brought against the Erkins in New York because they are not subject to personal jurisdiction in New York. Therefore, in the instant case, the anomaly the Fourth Circuit sought to avoid is not present. However, we find the other reasons advanced by the Fourth Circuit persuasive. The Fourth Circuit's reasoning is also consistent with our cases which have stated that "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 541 n.1 (2d Cir. 1956).

We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists. *C.f.*, *Fore Improvement Corp. v. Selig*, 278 F.2d 143, 147 (2d Cir. 1960) (Friendly, *J.*, concurring). This limitation is dictated by *Vanston*. In *Vanston*, the Court confronted a claim against a debtor for "interest on unpaid interest." 329 U.S. at 159. The debtor's other creditors argued that the instrument allowing for

interest upon interest was invalid — either under the laws of the states with a connection to the transaction or under federal law. To determine whether the instrument was valid, the Court was thus faced with a choice of law issue: whether state or federal law determined the validity of the interest upon interest provision. The Court determined that allowing interest upon interest would violate the policy of the Bankruptcy Act and that federal law governed. *Id.* at 163.

Vanston contains some broad statements that may be read to suggest that bankruptcy courts should not adopt the choice of law rules of the forum state. *E.g.*, *id.* at 161-62 ("[C]ourts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states."); *id.* at 162 ("In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits."). We do not view these statements as requiring a federal rule in this case. Rather, *Vanston* made clear that application of a federal rule is not foreclosed by *Erie* where there is a significant federal interest. *Vanston* does not mandate that, where there is no such significant federal interest, the federal courts must nonetheless apply federal conflicts rules. To read *Vanston* in this way would create a conflict between *Vanston* and the Supreme Court's pronouncements on the creation of federal common law.

Accordingly, the district court was correct in determining that New York's choice of law rules applied to the trustee's claim against defendants.

Appendix A

II. New York's Choice of Law Rules

When making a choice of law determination in a contract case, New York courts will normally apply the law of the jurisdiction having the greatest interest in the litigation, as measured by that jurisdiction's contacts with the litigation. *Matter of Allstate Ins. Co.*, 81 N.Y.2d 219, 225-28 (1993). This would seem to suggest that Idaho law, including Idaho's statute of limitations, would govern.

The district court relied on CPLR 202 for the proposition that, notwithstanding New York's normal conflicts rule, a New York state court sitting in this case would have applied New York's statute of limitations. CPLR 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, *except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.*

Id. (emphasis added).

We agree with the district court that CPLR 202 is in the nature of an exception to the normal New York conflicts rule of applying the law of the jurisdiction with the most significant contacts. *Cf.*, *Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 24 (1st Dept. 1997) ("Modern choice-of-law decisions are simply inapplicable to the question of statutory construction presented by CPLR 202. . . . CPLR 202 is to be applied as written, without recourse to a conflict

of law analysis."). In certain cases, CPLR 202 may mandate the application of the statute of limitations of a jurisdiction whose contacts with the action are not the most significant. We find that this is such a case.

In this case, New York's statute of limitations should only have been chosen if "the cause of action accrued in favor of a resident" of New York. Defendants argue that the cause of action did not accrue in favor of Bianco, who is admittedly a New York resident, and that G&S was not a New York resident.

Before the district court, defendants did not argue that, even if CPLR 202 applied, there was no New York resident who could benefit from it. Rather, they only argued against the application of CPLR 202 in the first instance. Thus, defendants forfeited their right to argue, on appeal, that there is no New York resident for the purposes of CPLR 202. *Krumme v. Westpoint Stevens Inc.*, 238 F.3d 133, 141-42 (2d Cir. 2000); *United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995). We normally will not consider an argument raised for the first time on appeal, *Diesel v. Town of Lewisboro*, 232 F.3d 92, 107-108 (2d Cir. 2000), and decline to exercise our discretion to consider defendants' argument.[7]

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7. Were the argument not waived, its validity would nevertheless be quite dubious. Even if defendants are correct that the claim did not accrue in favor of a New York resident, CPLR 202 requires application of the shorter of the statute of limitations of New York and the statute of limitations of the state in which the cause of action accrued. A nonresident's contract claim accrues where the nonresident resides. *Global Fin. Corp. v. Triarc Corp.*,

(Cont'd)

We agree with the district court that defendants' constitutional argument is without merit. Defendants argue that it is unconstitutional to apply New York's statute of limitations to them because they have no connection to New York. This argument would be more persuasive if a New York state court were applying New York's statute of limitations. Indeed, in that situation, defendants' constitutional argument would be that the New York state courts lack personal jurisdiction over them. Here, by contrast, defendants concede that the bankruptcy court had personal jurisdiction over them. Given this concession, there is no constitutional barrier to utilizing New York's statute of limitations. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988).

III. Nature of the Fee Arrangement

Defendants next present two related arguments. First, they argue the district court erred in refusing to submit their

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(Cont'd)
93 N.Y.2d 525 (1999). Here, G&S's residence, if not New York, is uncontestedly Massachusetts, which would apply a six year statute of limitations. *See* Mass. Stat. Ann. ch. 260 § 2.

Defendants also argue that because they have not developed sufficient contacts with either New York or Massachusetts for the courts of either state to be capable of asserting *in personam* jurisdiction over them, no cause of action can "accrue" against them in either state for purposes of CPLR 202. This argument was at one point accepted by this Court as reflecting New York law. *See Stafford v. Int'l Harvester Co.*, 668 F.2d 142, 151 (2d Cir. 1981). However, it has now been firmly rejected by the Court of Appeals. *See Ins. Co. of North America v. ABB Power Generation*, 91 N.Y.2d 180, 186 (1997).

position that G&S represented them on a contingency fee basis to the jury. Second, they argue that there was insufficient evidence that they entered into an oral agreement to pay G&S's hourly fees, and that the district court thus erred in allowing the jury to decide whether an oral agreement existed.

We find no error in the district court's determinations. Regarding the alleged contingency fee arrangement, Robert Erkins retracted his testimony that he and Vihon agreed upon a percentage of the recovery that G&S would receive, and defendants offered no other evidence of this term. While Idaho courts[8] may supply a missing contract term, they will only do so if there is a reasonably certain basis for supplying the term. *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709, 714-15 (Idaho 1979). Here, defendants suggest that the district court should have supplied a customary contingency percentage such as 33%. We agree with the district court that reference to custom is unavailing because the circumstances of this case are far removed from the typical situation in which a contingency fee arises. One such circumstance distinguishing this case from the typical contingency case is that merely defeating the bank's claim, without recovering on the counterclaim, would have been a favorable outcome for the Erkins but would not have resulted in any monetary recovery.

Regarding whether the district court properly submitted, to the jury, the question of whether the Erkins entered into an oral contract to pay G&S on an hourly basis, we agree

8. The parties agree that, aside from the statute of limitations, Idaho law governs this case.

that this was properly a question for the jury. McCabe's testimony that there was an oral contract to pay hourly fees, coupled with the documents which referenced such a contract, was sufficient. Additionally, the jury could have considered whether this case was so far removed from the typical case in which a contingency agreement is present as evidence that the relationship between the parties was actually predicated upon an oral contract to pay hourly fees.

IV. Prejudgment Interest

Section 28-22-104 of the Idaho Code provides for the award of prejudgment interest on "[m]oney after the same becomes due." Idaho Code § 28-22-104(1)2. The purpose of awarding prejudgment interest is to compensate the successful claimant for losing the use of the money between the date he or she was entitled to it and the date of judgment. *Stueve v. Northern Lights, Inc.*, 838 P.2d 323, 325-26 (Idaho Ct. App. 1992). Idaho courts award prejudgment interest where "the amount of liability is liquidated or capable of ascertainment by a mere mathematical calculation." *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 919 P.2d 334, 343 (Idaho 1996). Plaintiff argues that the Erkins' liability toward G&S was ascertainable by mere mathematical calculation. We agree.

In resolving this question, we must accept the jury's factual finding that the Erkins and G&S entered into an oral contract whereby the Erkins agreed to compensate G&S at G&S's hourly rate. Once this finding is accepted, it is clear that the amount of the Erkins' liability was ascertainable by a mathematical calculation.

We find *Haley v. Clinton*, 910 P.2d 795, 799 (Idaho Ct. App. 1996) to be distinguishable. In that case, the plaintiff argued the defendant agreed to pay attorney's fees incurred in a separate action. The trial court found an agreement to pay attorney's fees existed, a finding which was upheld by the Court of Appeals. The plaintiff then argued that she was entitled to prejudgment interest. The Court of Appeals disagreed, reasoning that "[o]ne of the main issues at trial was the amount of fees incurred and the amount that had been previously paid. In order to calculate the amount, the district court was required to make credibility determinations, examine conflicting documentary evidence and choose between competing arguments regarding differing sums. Thus, the amount of the award, if any, was not liquidated, nor was it capable of ascertainment by mere mathematical process." *Id.* at 799. In the instant case, by contrast, while the Erkins argued that there was no agreement to pay G&S on an hourly basis, the amount of fees owed if such an agreement existed was not a major issue at trial. We do not read *Haley* to mean that any time the fact of liability is disputed, prejudgment interest is inappropriate. *Cf., Ace Realty, Inc. v. Anderson*, 682 P.2d 1289, 1298 (Idaho Ct. App. 1984) ("[W]hether prejudgment interest should be awarded does not depend upon whether the amount claimed is disputed or unlitigated. If it did, prejudgment interest would never be awarded — a party could delay payment without incurring interest expense by disputing and litigating any claim." (internal citations omitted)).

CONCLUSION

We have considered defendants' remaining arguments and find them to be without merit. The judgment of the district court is affirmed.

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 16, 2000

[commencing at page 1123]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 CV 9343 (JSR)

ALFRED J. BIANCO, as Plan Administrator to the Estate of Gaston & Snow, and GASTON & SNOW,

Plaintiffs,

v.

ROBERT A. ERKINS and BERNARDINE ERKINS,

Defendants.

March 16, 2000
9:20 a.m.

Before:

HON. JED S. RAKOFF

District Judge,
and a Jury

* * *

Appendix B

[1172] THE COURT: Very good. You may step down.

(Witness excused)

MR. LEROY: Judge, may we have a ten-minute recess to determine whether our other witnesses arrived?

THE COURT: All right. Is that your last witness?

MR. LEROY: Yes, your Honor.

THE COURT: Why don't we give the jury fifteen minutes, then.

(The jury left the courtroom.)

THE COURT: We could also use part of this time to discuss the statute of limitations. Let's take five minutes at this time to do that. Anything further from defense counsel?

MR. MOSS: I had a chance to look at the cases that your Honor's law clerk had discovered last night, and I guess I was hoping to see that they would present the same unique situation that we are in. They don't, unfortunately. They really deal with the issue of an occasion where there is New York jurisdiction over the parties and therefore the borrowing statute clearly is appropriate to apply. How do you construe language in the borrowing statute that talks about the accrual of an out-of-state claim.

So I think we are probably still left with my raw analysis of yesterday that the borrowing statute should not be applied

in this situation where there is no *in personam* [1173] jurisdiction by which the Erkins can properly be subjected to a claim were we sitting in a state court in New York. Were this matter in a state court in New York, it would be subject to a motion to dismiss for lack of *in personam* jurisdiction, and the case would go away or go back to Idaho for that reason.

We are not going to see a case in which the Court has to grapple with the application of a borrowing statute in the absence of *in personam* jurisdiction, because in that case the case will go away because the Court grants the motion to dismiss on jurisdictional grounds.

So I doubt that, if we scour the case law, we will find a case that is similar to this, unless it arises in the same unique circumstances that this one has, as a reference from a bankruptcy proceeding.

Just a little bit of amplification. From my understanding of the bankruptcy proceeding, this was an involuntary proceeding filed against Gaston & Snow in New York. Gaston & Snow is a Massachusetts partnership. It had a New York office. Therefore, under the technical venue provisions of the Bankruptcy Act, venue was proper here in connection with the involuntary filing. Gaston & Snow, as I understand it, sought to remove the case back to Massachusetts. It wanted it handled in the Bankruptcy Court of Massachusetts. Judge Blackshear retained jurisdiction [1174] here. So, but for the fortuity that the involuntary filing was here in New York, this case could be in Massachusetts or anywhere else where Gaston & Snow had an office. The fortuity that we would be

here in New York would be a reference out of the Bankruptcy Court in New York, and therefore the New York court would be saying, should we apply the borrowing statute of New York. A court in Massachusetts could be saying the same thing, or anywhere else if they had an office.

The bottom line is that it is fundamentally unfair and, I think, constitutionally infirm for the Erkins to be drawn into this jurisdiction where they did not consent to the jurisdiction of New York either by their practice, where they conduct their business, where they own real estate, where they reside, where they have any contacts. They have not consented to the jurisdiction of the courts of New York.

In a claim in which there is no relationship to the State of New York in any of the activities that underlie the claim, to be saying that the New York borrowing statute should be used to select the New York statute of limitations in reference to the Idaho statute of limitations, I think is wrong. I don't think there is any case interpreting the New York borrowing statute that would call for that result.

THE COURT: Just so I am clear about one thing, you have not invoked this claim of unconstitutionality with respect to anything other than the application of this [1175] borrowing statute; correct?

MR. MOSS: That's correct.

THE COURT: Let me hear from plaintiff.

MR. KLAUSNER: I think the case that your Honor's law clerk found confirms that the borrowing statute means

what it says with respect to a New York resident getting the benefit of New York statute of limitations. The primary purpose of the borrowing statute is to prohibit forum-shopping. I think Mr. Moss will concede no one was forum-shopping in this case.

THE COURT: The thrust of the case seems to be that a statute as plain in its language as this does not require the Court to get into a more refined analysis with respect to policy, history, purpose, or whatever. Those would be typical things a court would look to if there were ambiguity in the statute, but here there is none.

So I think the issue ultimately comes down to the constitutional issue, which, of course, goes beyond the language in the statute, Mr. Moss has raised a number of issues, but I think the one we are stuck with at the end is whether the application of the New York borrowing statute in this case — in this unusual, perhaps unique, situation — is constitutionally defective. There are certainly numerous cases in the Supreme Court of the United States that have dealt with situations where a long-arm statute, for example, valid on its face, as applied, was nevertheless [1176] constitutionally infirm, violating due process in the matter of this exercise. There is no Supreme Court case that I know of bearing on this particular situation.

I think that is the ultimate issue that has now been boiled down as a result of research that we have done in the few days since this issue has come up. If you want to say anything to that issue, you may.

MR. KLAUSNER: There is jurisdiction over the Erkins in the Bankruptcy Court. There has been no motion to dismiss for lack of personal jurisdiction in this court. I believe either there is already a waiver of that issue or determination of that issue.

With respect to constitutionality, I am not sure whether or not a resident invoking a cause of action under New York law, for example, against an out-of-state resident would be subjected to some constitutional argument that because this person doesn't have any relationship to New York, they can't be held liable under some New York cause of action. I think that is analogous to this situation here, which is a statute designed to benefit the plaintiff, not to benefit the defendant.

THE COURT: I am grateful, in a manner of speaking, that all these issues have been raised, even though they had to be decided on the fly, so to speak, because, if nothing else, they are reminiscent of law school exams. But I think, [1177] in the end, I am going to deny defendants' statute of limitations argument. I haven't invoked waiver generally as to the constitutional argument. But, putting waiver aside, I do find that the application in this case is not constitutionally infirm.

As to the other arguments of the defendant, I take it that the case law, as I look at it, makes increasingly clear that this statute needs to be applied according to the plain language, and by its plain language the six-year statute of limitations would be applicable to the claims here in issue.

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I will note, for the purposes of any appeal, that if I am wrong and the four-year statute of limitation applies, then any jury recovery on quantum meruit claim, any plaintiffs recovery on the quantum meruit claim, would be invalid. It would be invalid as a matter of law. I will not make a final determination, but leave it to a higher court, if it has to reach that issue.

I think there is a good deal to what defense counsel argued yesterday, that even the oral contract claim has not been made out sufficiently to show that an essential element of that claim that it was mutually assented to was a forbearance of the kind that would bring the contract claim within the four-year statute of limitations. If that argument is correct, on the evidence presently presented, and the Court of Appeals were to find that it was the four-year statute of [1178] limitations, then I think both those claims would fall, both the recovery on either the oral contract or on the quantum meruit. I say that because once is quite sufficient to try this case.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 5, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9343 (JSR)

ALFRED J. BIANCO, As Plan Administrator to the Estate of Gaston & Snow,

Plaintiff,

– v –

ROBERT A. ERKINS and BERNARDINE ERKINS,

Defendants.

ORDER

JED S. RAKOFF, U.S.D.J.

On March 20, 2000 the jury returned a verdict in favor of plaintiff and against defendants jointly and severally in the amount of $1,800,841.41, exclusive of interest. Following review of the parties' submissions, the Court determines that, under applicable Idaho law, plaintiff is also entitled to pre-judgment interest at the rate of 12%, running from June 6, 1990 to March 20, 2000 and totaling $2,114,364.94. As for plaintiff's application for attorneys' fees, the Court, in accordance with its usual practice of deferring consideration of such applications until the resolution of any appeals,

denies the application without prejudice to its being renewed after resolution of any appeal or expiration of the time to appeal if no appeal is filed. Finally, as for defendants' application to stay the judgment pending any appeal, the Court will grant such an application if and when the defendants post a suitable bond acceptable to the Court.

Accordingly, the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of $3,915,206.35.

SO ORDERED.

s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
April 5, 2000

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED APRIL 6, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 **CIVIL** 9343 (JSR)

ALFRED J. BIANCO, As Plan Administrator to the Estate of Gaston & Snow,

Plaintiff,

– against –

ROBERT A. ERKINS and BERNARDINE ERKINS,

Defendants.

JUDGMENT

A Jury Trial before the Honorable Jed S. Rakoff, United States District Judge, having begun on March 6, 2000, and at the conclusion of the trial, the jury having rendered a verdict in favor of the plaintiff and against defendants jointly and severally in the amount of $1,800,841.41, exclusive of interest; thereafter, following review of the parties' submissions, the Court having determined that, under applicable Idaho law, plaintiff is also entitled to pre-judgment interest at the rate of 12%, running from June 6, 1990 to March 20, 2000 and totaling $2,114,364.94 and the Court, on April 5, 2000, having rendered its Order directing the

Appendix D

Clerk of the Court to enter judgment in favor plaintiff and against defendants jointly and severally in the amount of $3,915,206.35, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to the Jury Verdict and the Court's Order dated April 5, 2000, plaintiff have judgment against defendants jointly and severally in the amount of $3,915,206.35 as against the defendants.

DATED: New York, New York
April 6, 2000

JAMES M. PARKISON
Clerk of Court
BY:

s/ [illegible]
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED AND FILED JUNE 26, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26 day of JUN two thousand one.

Present:

Hon. Ellsworth Van Graafeiland

Hon. Ralph K. Winter

Hon. Guido Calabresi

CIRCUIT JUDGES

Docket No. 00-5039

In re: Gaston & Snow

Appendix E

A petition for panel rehearing having been filed herein by Robert and Bernardine Erkins

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney